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THE BANK OF NEW YORK
MELLON TRUST COMPANY, N.A.

THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MARIA G. SOSA, an individual,

Plaintiff,

vs.

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.; and DOES 1 through 20, inclusive,

Defendants.

Case No. C 12-00144 LB

NOTICE OF DEFENDANT BANK OF NEW YORK MELLON TRUST COMPANY, N.A.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

DATE: February 16, 2012
TIME: 11:00 a.m.
CTRM: 4 – 3rd Floor
JUDGE: Mag. Judge Laurel Beeler

[Removal from the Superior Court of California, County of San Mateo, Case No. CIV510305]

Complaint filed: December 9, 2011

NOTICE OF MOTION TO DISMISS

TO THE COURT AND PLAINTIFFS HEREIN:

PLEASE TAKE NOTICE that on February 16, 2012 at 11:00 a.m., or as soon thereafter as the matter may be heard, before The Honorable Laurel Beeler in Courtroom 4, 3rd Floor, of the above captioned Court located at 1301 Clay Street, Oakland, California, 94612, Defendant THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. ("BNYM") will move this Court to dismiss Plaintiff MARIA G. SOSA's Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: January 13, 2012

BLEDSOE, CATHCART, DIESTEL,
PEDERSEN & TREPPA, LLP

By /s/ Claudia L. Williams
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FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MARIA G. SOSA, an individual, Plaintiff, vs. THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.; and DOES 1 through 20, inclusive, Defendants.	Case No. C 12-00144 LB **DEFENDANT BANK OF NEW YORK MELLON TRUST COMPANY, N.A.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** DATE: February 16, 2012 TIME: 11:00 a.m. CTRM: 4 – 3rd Floor JUDGE: Hon. Laurel Beeler [Removal from the Superior Court of California, County of San Mateo, Case No. CIV510305] **Complaint filed: December 9, 2011**

MOTION TO DISMISS

Defendant THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. ("BNYM") hereby moves this Court to dismiss Plaintiff MARIA G. SOSA's Complaint with prejudice pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) as the allegations in the Complaint fail to state a single claim upon which relief can be granted. Also, this Motion is made under FRCP 9(b) because, where required, Plaintiff has failed to state her claims with the required specificity. Dismissal with prejudice is appropriate as Plaintiff's claims rely on defective legal theories and cannot be cured by amendment. This Motion is based upon the accompanying Notice of Motion and Memorandum of Points and Authorities, as well as all pleadings, papers, and documents on file herein, any oral argument that may be presented at the time of the hearing, and any matters of which judicial notice is requested and/or is taken.

Dated: January 13, 2012

BLEDSOE, CATHCART, DIESTEL,
PEDERSEN & TREPPA, LLP

By /s/ Claudia L. Williams
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THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

MARIA G. SOSA, an individual, Plaintiff, vs. THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.; and DOES 1 through 20, inclusive, Defendants.	Case No. C 12-00144 LB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BANK OF NEW YORK MELLON TRUST COMPANY, N.A.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** DATE: February 16, 2012 TIME: 11:00 a.m. CTRM: 4 – 3rd Floor JUDGE: Hon. Laurel Beeler [Removal from the Superior Court of California, County of San Mateo, Case No. CIV510305] **Complaint filed: December 9, 2011**

I. INTRODUCTION

Plaintiff MARIA G. SOSA is in serious default on her mortgage and has filed suit to stall the inevitable foreclosure of her property. For the reasons discussed below, Plaintiff's factual allegations and legal arguments lack merit, and her unnecessarily voluminous and repetitive Complaint fails to state a single claim against defendant THE BANK OF NEW YORK MELLON NATIONAL TRUST COMPANY, N.A. ("BNYM"). Thus, BNYM's Motion to Dismiss should be granted with prejudice.

II. FACTUAL SUMMARY

In 2007, Plaintiff obtained a $544,000.00 loan secured by a deed of trust on the real property located at 475 Bell Street, East Palo Alto, California 94303 (the "Property"). (Complaint, ¶¶2, 22.)

Plaintiff cannot dispute that she is in serious default on the loan. However, she nonetheless argues that her breach of the Note is excused because BNYM also breached unidentified obligations and because the Note and deed of trust are voidable. (Complaint, ¶20.)

On September 16, 2010, a Notice of Default was recorded providing Plaintiff was $22,933.60 in default as of September 15, 2010. (Complaint, ¶28; BNYM RJN, Ex A.) The Notice of Default Declaration Pursuant to California Civil Code §2923.5 (the "Declaration") executed by John Kennerty of Wells Fargo Home Mortgage was attached to the Notice of Default. (Complaint, ¶¶28-30; BNYM RJN, Ex. A.) The Declaration provides that Civil Code §2923.5 was satisfied. (Complaint, ¶¶28-30; BNYM RJN, Ex. A.) Plaintiff's entire Complaint is premised on the allegation that this Declaration is "ambiguous" and false. (See, e.g., Complaint, ¶¶28-30, 32, 33.)

On January 28, 2011, a Notice of Trustee's Sale was recorded. (Complaint, ¶¶36-39.)

In September 2011, BNYM was assigned the Note and deed of trust. (Complaint, ¶¶13, 23, 24.)

The Property was scheduled to be sold at a trustee's sale on December 14, 2011. (Complaint, ¶26.)

III. PROCEDURAL BACKGROUND

On December 9, 2011, Plaintiff filed suit in San Mateo County Superior Court.

On December 16, 2011, BNYM was served with the summons and complaint.

On January 9, 2012, BNYM removed the case to this Court.

IV. STATEMENT OF THE ISSUE

Whether a Declaration providing Civil Code §2923.5 was satisfied must provide the specific method through which the statute was satisfied.

V. LEGAL STANDARD

Federal Rule of Civil Procedure ("FRCP") 12(b)(6) authorizes a district court, upon motion of a party, to dismiss a claim for "failure to state a claim upon which relief can be granted [.]" Dismissal is required where the complaint fails to articulate a "cognizable legal theory." (*Balistreri v. Pacifica Police Dept,* 901 F. 2d 696, 699 (1990).) Labels, speculative allegations, and conclusions are insufficient to withstand a motion to dismiss. (*Bell Atl. Corp v. Twombly*, 550 U.S. 544, 550, 555 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).)

Although Rule 8 does not require detailed factual allegations, it does demand "more than an unadorned, the defendant-unlawfully-harmed-me accusation." (*Heald v. National City Mortg.*, 2011 WL 5513226, at *1 (N.D. Cal.) (citing *Ashcroft*, 129 S.Ct. at 1949 [citing *Twombly*, 550 U.S. at 555]).) In general, a court may not consider items outside the pleadings when deciding a motion to dismiss, but it may consider items of which it can take judicial notice. (*Id.* at *3, citing *Barron v. Reich,* 13 F.3d 1370, 1377 (9th Cir.1994).)

For the reasons discussed below, BNYM's Motion to Dismiss Plaintiff's Complaint should be granted with prejudice.

VI. LEGAL ARGUMENT

1. **Plaintiff's First Claim for Violation of Civil Code §2923.5 Fails Because Civil Code §2923.5 Does Not Provide a Post-Sale Remedy, the Declaration Attached to the Notice of Default May Track the Language of the Statute, and Plaintiff Is Not In A Position to Allege Civil Code §2923.5(g) Was Not Satisfied.**

Civil Code §2923.5 Does Not Provide a Post-Sale Remedy. The seminal case discussing Civil Code §2923.5, *Mabry v. Superior Court*, 185 Cal.App.4th 208 (4th Dist. 2010), explains that the statute does not provide a post-sale remedy. (*Mabry*, 185 Cal.App.4th at 235 ["[T]he *only* remedy provided is a postponement of the sale before it happens."] (emphasis in original); See also, *Stebley v. Litton Loan Servicing, LP*, 2011 WL 5975655, at *2 (3rd Dist. 2011).) In this case, Plaintiff admits the sale will occur before this Motion is heard. (Complaint, ¶26 [trustee's sale scheduled for December 14, 2011].) Thus, Plaintiff is precluded from obtaining relief under Civil Code §2923.5.

The Declaration Attached to the Notice of Default is Sufficient to Satisfy Civil Code §2923.5. The Declaration, according to Plaintiff, is "ambiguous" because it does not specify the *how* Civil Code §2923.5 was satisfied. (Complaint, ¶¶57, 58.) Yet, there is no requirement that the Declaration provide *how* Civil Code §2923.5 was satisfied. *Mabry* explained that a declaration of compliance with Civil Code §2923.5 only needs to track the language of the statute. (*Mabry*, 185 Cal.App.4th at 235.) Holding otherwise would conflict with the purpose of California's non-judicial foreclosure scheme of providing a speedy and expensive remedy after a borrower defaults on her loan . (See *Id.* at 233-235) Thus, Plaintiff's admission that the Declaration attached to the Notice of Default tracks the language of the statute necessarily establishes compliance with the statute. (*Id.* at 235; BNYM RJN, Ex. A; Complaint, ¶57.) Accordingly, Plaintiff's claim fails for this reason as well.

Plaintiff Is Not In a Position to Allege the Due Diligence Requirements of Civil Code §2923.5 Were Not Satisfied. Plaintiff's conclusory allegation that she was not contacted within the meaning of Civil Code §2923.5 is a legal conclusion insufficient to overcome a motion to dismiss. (*Twombly*, 550 U.S. at 555 [legal conclusion insufficient to withstand motion to dismiss]; Complaint, ¶32.) True or not, Plaintiff is in a position to *allege* she was not contacted within the meaning of Civil Code §2923.5(a)(2). However, Plaintiff is not in a position to allege the due diligence requirements of Civil Code §2923.5(g) were not satisfied as that section is utilized only when borrower contact *cannot* be made. (See Complaint, ¶¶69-70.) As Plaintiff could not know if Civil Code §2923.5(g) was satisfied, her legal conclusion that the statute was not satisfied must be rejected.

For the foregoing reasons, BNYM's Motion to Dismiss Plaintiff's first claim for Violation of Civil Code §2923.5 should be granted with prejudice.

2. **Plaintiff's Second Claim for Violation of Civil Code §2924 Fails Because Plaintiff Cannot Establish a Claim Under Civil Code §2923.5 And Because She Has Not Tendered.**

Plaintiff's second cause of action is for wrongful foreclosure premised on an alleged violation of Civil Code §2923.5. (Complaint, ¶¶80-96.) According to Plaintiff, the foreclosure is wrongful because the Notice of Default and Notice of Trustee's Sale were executed without complying with Civil Code §2923.5. (See, e.g., Complaint, ¶¶92, 94.)

Civil Code 2923.5 Cannot Provide a Basis for Plaintiff's Wrongful Foreclosure Claim.

For the reasons discussed above, Plaintiff's claim for Violation of Civil Code §2923.5 lacks merit and, accordingly, cannot serve as a basis for her wrongful foreclosure claim under Civil Code §2924.

Plaintiff's Wrongful Foreclosure Claim Also Fails Because Plaintiff Has Not Tendered. "When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for foreclosure." (*Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F.Supp.2d 1022, 1034 (N.D. Cal. 2010), citing *Alicea v. GE Money Bank*, 2009 WL 2136969, at *3 (N.D. Cal.).) A tender must be unambiguous, unconditional, and one of full performance. (*Id.*; See also, *Heald*, supra, 2011 WL 5513226, at *5 [wrongful foreclosure claim dismissed where borrower failed to allege full and unambiguous tender of outstanding debt].) The basic rule is that an offer of performance is of no effect if the person making it is not able to perform. (*Karlsen v. American Sav. & Loan Assn.*, 15 Cal.App.3d 112, 118 (1971).) "The rules which govern tenders are strict and are strictly applied." (*Nguyen v. Calhoun*, 105 Cal.App.4th 428, 439 (2003).)

In this case, Plaintiff has not offered, or shown an ability, to tender. Thus, Plaintiff's claim fails for this reason as well.

Plaintiff's Wrongful Foreclosure Claim Also Fails Because She Was Not Prejudiced By the Alleged Irregularity. A "plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." (*Fontenot v. Wells Fargo Bank, N.A.*,198 Cal.App.4th 256, 272 (2011) (citations omitted).) "Prejudice is not presumed from 'mere irregularities' in the process." (*Id.* (citations omitted).)

In this case, Plaintiff has not, and cannot, show she was prejudiced by the alleged failure to satisfy Civil Code §2923.5 as she was admittedly in serious default on the mortgage which entitled the beneficiary to foreclose on the Property. Further, even if Civil Code §2923.5 was not satisfied, which BNYM denies, Plaintiff cannot establish how compliance with the statute would have prevented the foreclosure, which is her alleged injury. (Complaint, ¶96.)

For the foregoing reasons, BNYM's Motion to Dismiss Plaintiff's second claim for Violation of Civil Code §2924 should be granted with prejudice.

3. Plaintiff's Third Claim for Violation of Civil Code §17200 *et seq.* Fails Because Plaintiff Lacks Standing and Cannot Establish a Claim Under Any Prong of the UCL.

California's Unfair Competition Law ("UCL"), Business and Professions Code §17200 *et seq.*, defines unfair competition as "any unlawful, unfair or fraudulent business act or practice." (See. Cal. Bus. & Prof. Code § 17200.) The UCL is written in the disjunctive and establishes three varieties of unfair competition – acts or practices that are unlawful, unfair, or fraudulent. (*Heald*, supra, 2011 WL 5513226, at, at *6 (citation omitted).) "A plaintiff must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of Cal., Inc.*, 14 Cal.App.4th 612, 619 (1993).)

Plaintiff Lacks Standing to Bring a UCL Claim. Plaintiff lacks standing to bring a UCL claim because she has not suffered injury in fact or lost money or property as a result of BNYM's purported unfair competition. (Cal. Bus. & Prof. Code §17204.) In fact, Plaintiff cannot dispute that she was in serious default on her mortgage – $22,933.60 as of September 15, 2010 – and that amount has continued to increase. (See BNYM RJN, Ex. A.) Thus, Plaintiff has not lost money or property – instead, she has lived rent-free in the Property for at least one year. (See BNYM RJN, Ex A [Plaintiff was $22,933.60 in default as of September 15, 2010].)

Even If Plaintiff Had Standing, She Cannot State a Claim Under the Unlawful Prong of the UCL. The unlawful prong of the UCL "borrows" violations of other laws and treats those violations as "unlawful practices, independently action under section 17200 et seq. and subject to the distinct remedies provided thereunder." (*Heald*, supra, 2011 WL 5513226, at *7, citing *Farmers Ins. Exch. V. Super. Ct. of L.A. County*, 2 Cal.4th 377 (1992).) In this case, Plaintiff seeks to borrow purported violations of California Civil Code sections 2923.5 and 2924. (Complaint, ¶101.) However, as discussed above, these claims lack merit. Accordingly, Plaintiff cannot state a claim under the unlawful prong of the UCL.

Even If Plaintiff Had Standing, She Cannot State a Claim Under the Unfair Prong of the UCL. The unfair prong of the UCL prohibits conduct that "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws." (*Heald*, supra, 2011 WL 5513226, at, at *7, citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163 (1999).) Plaintiff contends that BNYM's purported misconduct is "unfair" because it is injurious to borrowers and the utility of the conduct is outweighed by the harm caused to Plaintiff. (Complaint, ¶¶115-16.) Plaintiff does not, and cannot, allege that the purported misconduct threatens an "incipient violation of an antitrust law, or violates the policy or spirit of one of those laws." (See *Heald*, *supra*, 2011 WL 5513226, at, at *6.) In *Heald*, for example, this Court held that allegations relating to loan origination and wrongful foreclosure do not threaten antitrust violations and could not serve as a basis for a claim under the unfair prong. (*Id.* at 8.) Similarly, Plaintiff's allegations relating to a purported wrongful foreclosure also do not state a claim under the unfair prong.

Even if Plaintiff Had Standing, She Cannot State a Claim Under the Fraudulent Prong. To state a claim under the fraudulent prong of the UCL, Plaintiff must allege that public is likely to be misled by BNYM's purported misconduct and, to the extent she seeks injunctive relief, that she has suffered actual injury caused by the purported misconduct. (*Id.*) A claim under the fraudulent prong of the UCL must also satisfy FRCP 9(b) if it alleges a unified course of fraudulent conduct. (*Heald*, supra, 2011 WL 5513226, at *8, citing *Vess v. Ciba-Geigy Corp., U.S.A.*, 317 F.Supp.3d 1097, 1103 (9th Cir. 2003).)

In this case, Plaintiff contends that BNYM violated the fraudulent prong by engaging in "one or more" of eight identified acts. (Complaint, ¶103(a)-(h).) This is wholly insufficient to satisfy the "reasonable particularity" requirement necessary for all UCL claims (*Khoury*, *supra*, 14 Cal.App.4th at 619), let alone satisfy FRCP 9(b)'s heightened pleading standard. FRCP 9(b) requires Plaintiff to allege: (1) a misrepresentation, (2) BNYM's knowledge of falsity, (3) BNYM intended to defraud her, (4) her justifiable reliance, and (5) resulting damage, as well as the "who, what, when, where, and how" of the purported misconduct. (*Heald*, supra, 2011 WL 5513226, at, at *4, 8, 9 (citations omitted).) Plaintiff's failure to even allege which of the eight listed acts BNYM engaged in, let alone allege it with the required specificity of FRCP 9(b), is fatal to her claim under the fraudulent prong of the UCL.

For the foregoing reasons, BNYM's Motion to Dismiss Plaintiff's third claim for Violation of Business and Professions Code §17200 *et seq*. should be granted with prejudice.

4. Plaintiff's Fourth Claim for Negligent Misrepresentation Fails Because BNYM Did Not Owe Plaintiff A Duty And Plaintiff Cannot Establish FRCP 9(b)'s Heightened Pleading Requirements.

Plaintiff contends that the purported violation of Civil Code §2923.5 also constitutes a negligent misrepresentation yet, as discussed below, she is mistaken.

Plaintiff's Negligent Misrepresentation Claim Fails Because BNYM Did Not Owe Her a Duty. "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp*, 199 Cal.App.3d 858, 864 (1988).) Plaintiff's failure to establish BNYM owed her a duty is fatal to her claim. (*Saldate v. Wilshire Credit Corp.*, 711 F.Supp.2d 1126, 1133 (E.D. Cal. 2010) [borrower's negligence claim dismissed where failed to show duty owed to him.)

In this case, Plaintiff contends that BNYM had a "duty to Plaintiff to ensure that the non-judicial foreclosure process on the Subject Property was conducted fairly and according to prescribed statutory procedures." (Complaint, ¶66.) Plaintiff does not allege how BNYM, which was allegedly assigned the Note and Deed of Trust one year after the Declaration was executed, owed Plaintiff a duty. (Complaint, ¶¶13, 23, 24.) Further, that the Declaration was executed by Wells Fargo Home Mortgage demonstrates that BNYM did not owe Plaintiff a duty to comply with Civil Code §2923.5 at time the Declaration was executed. (BNYM RJN, Ex A.) Plaintiff's failure to establish BNYM owed her a duty precludes her from stating a claim for negligent misrepresentation.

Even if BNYM Owed Plaintiff a Duty, She Still Cannot State a Claim for Negligent Misrepresentation As She Cannot Satisfy FRCP 9(b)'s Heightened Pleading Standard. To state a claim for negligent misrepresentation, Plaintiff must establish (1) a misrepresentation (false representation, concealment, or nondisclosure), (2) BNYM lacked reasonable grounds for believing the representation was true, (3) intent to defraud (i.e., to induce reliance), (4) justifiable reliance, and (5) resulting damage. (*Griffith v. Bank of America, N.A.*, 2011 WL 6849048, at *3 (C.D. Cal.), citing *Neilson v. Union Bank of Cal., N.A.,* 290 F.Supp.2d 1101, 1141 (C.D.Cal.2003) (citations omitted).) A negligent misrepresentation also must satisfy FRCP 9(b)'s heightened pleading requirements. (*Id.*)

Plaintiff cannot satisfy FRCP 9(b)'s heightened pleading requirement because, among other reasons, the Declaration was executed by Wells Fargo Home Mortgage, not BNYM. Plaintiff contends that BNYM, "or the mortgagee, beneficiary, or their authorized agent failed to contact Plaintiff" pursuant to Civil Code §2923.5. (Complaint, ¶122.) BNYM cannot be liable for the purported misconduct of Wells Fargo Home Mortgage in executing the Declaration. (BNYM RJN, Ex. A.) Also, BNYM necessarily did not misrepresent that Civil Code §2923.5 was satisfied because the Declaration was executed by Wells Fargo Home Mortgage. Also, BNYM could not have known the state of mind of Wells Fargo Home Mortgage when executing the Declaration. Most importantly, Plaintiff could not have justifiably relied on, or been damaged by, the purported violation of Civil Code §2923.5 *by another entity* as she was in serious default on her loan and cannot allege that the contact would have permitted her to cure the default.

For the foregoing reasons, BNYM's Motion to Dismiss Plaintiff's fourth claim for negligent misrepresentation should be granted with prejudice.

5. Plaintiff's Fifth Claim for Declaratory Relief Fails Because She Has Not Tendered And Cannot State an Actual Controversy Or Predicate Claim.

Plaintiff's Failure to Tender Precludes Her Request for Declaratory Relief. California Courts deny requests for declaratory relief where the debtor has failed to tender amounts due and owing under a promissory note secured by a deed of trust. (See, e.g., *Rodriguez v. Litton Loan Servicing, LP*, 2009 WL 1326339, at *7 (E.D. Cal.) [dismissing claim for declaratory relief where the plaintiff failed to allege his ability and willingness to tender the loan proceeds]; *Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp.2d 1022, 1033-35 (N.D. Cal. 2010) [same].) As discussed above, Plaintiff has not tendered. Thus, her claim for declaratory relief must fail.

Plaintiff Cannot State an Actual Controversy. "A declaratory relief claim requires an actual controversy between the parties." (*Jara v. Aurora Loan Servs., LLC*, 2011 WL 6217308, at *11.) Here, Plaintiff contends an actual controversy exists regarding BNYM's right to foreclose on the Property as its security interest "has been rendered void by operation of law." (Complaint, ¶141.) Plaintiff does not allege how the security interest was rendered void by operation of law. Plaintiff does allege, however, that the Note and Deed of Trust were assigned to BNYM in September 2011 – one year after the Declaration was executed. (Complaint, ¶¶13, 23, 24; BNYM RJN, Ex A [Declaration executed September 14, 2010].) This contention undermines Plaintiff's request for declaratory relief as shows BNYM has an interest in both the Note, which was breached by Plaintiff's non-payment, and the Deed of Trust, which secured repayment of the Note. Thus, Plaintiff's claim fails as she has not stated an actual controversy.

Plaintiff Cannot State a Predicate Claim. Declaratory relief is not a separate claim but, rather, is a remedy for a successful underlying claim. (*Gomez*, supra, 2010 WL 291817, at *2, citing *Weiner v. Klais & Co.*, 108 F.3d 86, 92 (6th Cir. 1997) [plaintiff cannot state a claim for declaratory relief in the absence of a viable claim].) As discussed throughout this brief, Plaintiff cannot state a successful underlying claim warranting the requested relief.

For the foregoing reasons, BNYM's Motion to Dismiss Plaintiff's fifth claim for declaratory relief should be granted with prejudice.

VII. CONCLUSION

Plaintiff's Complaint fails to plead adequate and material facts, fails to plead a cognizable legal theory upon which to impose liability on BNYM, and it is simply insufficient as a whole to require BNYM to defend itself any further in this litigation. Accordingly, BNYM respectfully requests that its Motion to Dismiss Plaintiff's entire Complaint be granted with prejudice and judgment be entered in its favor and against Plaintiff.

Dated: January 13, 2012

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